No. 14-116

In the Supreme Court of the United States

LOUIS B. BULLARD, PETITIONER

v.

BLUE HILLS BANK, FKA
HYDE PARK SAVINGS BANK

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an order denying confirmation of a proposed Chapter 13 bankruptcy plan is a final order that is appealable as of right.

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Black's Law Dictionary (9th ed. 2009) 12, 15, 21

Rhett G. Campbell, *Issues in Litigation*, 1 J. Bankr. L. & Prac. 94 (1991) 20

Collier on Bankruptcy (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. Sept. 2014):

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Webster's Third New International Dictionary (1993) 21

15A Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 1992 & Supp. 2014) 26

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the Court's resolution of the question presented because United States Trustees, who are Department of Justice officials appointed by the Attorney General, are charged with supervising the administration of bankruptcy cases. 28 U.S.C. 581-589a. United States Trustees "may raise and may appear and be heard on any issue in any case or proceeding under" the Bankruptcy Code. 11 U.S.C. 307. Resolution of the question presented may affect the sound administration of the bankruptcy system and the appealability of other orders relating to United States Trustees' duties.

STATEMENT

1. In a bankruptcy under Chapter 7 of the Bankruptcy Code, a debtor's assets are generally liquidated and distributed to creditors. See 11 U.S.C. 726. In a bankruptcy under Chapter 13, by contrast, debtors "develop a plan to repay all or a portion of their debts over a period of time specified in the plan." *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 264 (2010). Confirmation of a proposed Chapter 13 plan "will result in a discharge of the debts listed in the plan if the debtor completes the payments the plan requires." *Ibid.*; see 11 U.S.C. 1328(a).

A Chapter 13 debtor must be an individual with regular income whose indebtedness falls below certain statutory limits. 11 U.S.C. 109(e). A debtor initiates a Chapter 13 case by filing a petition in bankruptcy court. 11 U.S.C. 301(a), 303(a). That filing automatically stays all collection efforts against the debtor. 11 U.S.C. 362(a). Within 14 days, the debtor must propose a plan that identifies all claims against the estate, allocates a portion of his income to pay unsecured claims on a pro rata basis, and proposes a payment schedule. 11 U.S.C. 1321, 1322; Fed. R. Bankr. P. 3015(b). All payments under a plan must be made within three to five years. 11 U.S.C. 1322(d).

Any party in interest may object to a proposed Chapter 13 plan. 11 U.S.C. 1324(a). Such an objection initiates a "contested matter" that is governed by Federal Rule of Bankruptcy Procedure 9014. See Fed. R. Bankr. P. 3015(f), 9014. If the court resolves the contested matter by overruling all objections and confirming the plan, the debtor must make all required payments under the plan. If the debtor does so, the court will discharge the debtor's remaining un-

secured debts, subject to certain exceptions. 11 U.S.C. 1328(a).

2. The district courts have original jurisdiction in bankruptcy cases, and they typically refer bankruptcy cases to the bankruptcy courts. See 28 U.S.C. 1334, 157(a).[1] District courts have appellate jurisdiction over appeals "from final judgments, orders, and decrees * * * entered in cases and proceedings" in bankruptcy courts. 28 U.S.C. 158(a)(1). If a bankruptcy appellate panel has been established within a particular judicial circuit, appeals under Section 158(a) will be heard by the panel unless the appellant chooses to appeal to the district court or a party to the appeal does not consent to the panel's jurisdiction. 28 U.S.C. 158(b)(1) and (c)(1). The courts of appeals in turn "have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered" by a district court or bankruptcy appellate panel under Section 158(a) or (b). 28 U.S.C. 158(d)(1).

As relevant here, Section 158 also grants district courts and bankruptcy appellate panels jurisdiction to hear appeals from interlocutory orders "with leave of the court." 28 U.S.C. 158(a)(3). The courts of appeals also have jurisdiction to review interlocutory or final orders if (1) the bankruptcy court, district court, or bankruptcy appellate panel involved certifies, or all parties acting jointly certify, that (a) the appeal "involves a question of law as to which there is no controlling decision" from this Court or the court of appeals; (b) the appeal "involves a question of law requiring resolution of conflicting decisions"; or (c) "an

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[1] After a case has been referred to the bankruptcy court, a district court may withdraw all or part of the reference "for cause shown." 28 U.S.C. 157(d).

immediate appeal * * * may materially advance the progress of the case or proceeding in which the appeal is taken"; and (2) the court of appeals authorizes the appeal. 28 U.S.C. 158(d)(2)(A).

When district courts issue orders in bankruptcy cases, the general appellate-jurisdiction statutes apply. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). Final decisions of the district courts and orders relating to injunctions are appealable as of right. 28 U.S.C. 1291, 1292(a)(1). Interlocutory orders are appealable if the district court certifies that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal * * * may materially advance the ultimate termination of the litigation," and the court of appeals accepts the appeal. 28 U.S.C. 1292(b).

3. Petitioner owns and resides in a two-unit house in Randolph, Massachusetts, on which respondent holds a mortgage. Pet. App. 1a, 20a, 47a. The original principal was $387,000, and the mortgage will mature on June 1, 2035. *Id.* at 1a-2a. On December 14, 2010, petitioner filed a Chapter 13 petition. *Id.* at 47a. Respondent subsequently filed a proof of claim in the amount of $346,006.54. *Ibid.* Petitioner and respondent dispute the property's current value, appraising it at $245,000 and $285,000, respectively. *Ibid.* It is undisputed, however, that the house's current value is "substantially less than [respondent's] claim." *Ibid.*

Petitioner proposed a plan and amended it three times, filing his Third Amended Plan on January 17, 2012. Pet. App. 2a. That plan proposed "hybrid" treatment of his mortgage debt. *Ibid.* Petitioner proposed to bifurcate respondent's claim into a secured

portion, equal to the current value of the property, and an unsecured portion, consisting of the remaining debt. *Ibid.* Petitioner proposed to pay the secured portion by maintaining the monthly payments pursuant to the terms of the original note and for a period exceeding the maximum five-year term of a Chapter 13 plan (albeit for less than the full term of the mortgage because the principal would be reduced). *Id.* at 46a-48a; see *In re McGregor*, 172 B.R. 718, 720-722 (Bankr. D. Mass. 1994) (confirming a hybrid plan). He proposed to pay a dividend of approximately 5.26% on the unsecured portion of the claim during the five-year plan. Pet. App. 48a.

Respondent filed an objection under Federal Rule of Bankruptcy Procedure 3015(f), initiating a contested matter as to the validity of the plan. Pet. App. 2a; see Fed. R. Bankr. P. 9014. No other creditor objected. Respondent argued that the Bankruptcy Code allowed such a "cramdown" of its claim only if, after bifurcation, petitioner paid the entire secured portion during the five-year plan period. Pet. App. 2a, 49a. The bankruptcy court took briefing, held a hearing, and issued an order sustaining respondent's objection and denying confirmation on the ground that petitioner's proposed plan was "incompatible with the provisions of the Bankruptcy Code." *Id.* at 47a. On the same day, the bankruptcy court issued an order stating that petitioner "shall file a further amended plan [within 30 days], failing which, this case shall be dismissed." Bankr. Ct. Doc. 99, at 1 (July 24, 2012); see Pet. App. 67a.

4. Petitioner appealed to the Bankruptcy Appellate Panel for the First Circuit. Pet. App. 41a. Petitioner filed a motion seeking leave to appeal under Section

158(a)(3). *Ibid.* Petitioner also noted, but expressed his disagreement with, a prior decision of the panel holding that an order denying plan confirmation is not an immediately appealable final order. See *id.* at 41a & n.2; B.A.P. Doc. 113, at 4 (Aug. 22, 2012) (citing *In re Watson*, 309 B.R. 652 (1st Cir. B.A.P. 2004), aff'd, 403 F.3d 1 (1st Cir. 2005)).

The bankruptcy appellate panel treated petitioner's appeal as interlocutory but granted petitioner's motion for leave to appeal. Pet. App. 41a. The panel viewed its discretion to grant interlocutory review under Section 158(a)(3) as "informed by" 28 U.S.C. 1292(b), which governs interlocutory appeals from the district courts to the courts of appeals. Pet. App. 42a. The panel held that the Section 1292(b) standard was satisfied in this case, and it accordingly agreed to hear petitioner's appeal. *Id.* at 42a-45a.

The panel concluded, in that regard, that the validity of petitioner's hybrid plan presented a "controlling question of law * * * as to which there is substantial ground for difference of opinion," and that "an immediate appeal [would] materially advance the ultimate termination of the litigation." Pet. App. 42a-45a (citation omitted). The panel stated that petitioner apparently "could not realize confirmation of a subsequent amended plan," and that petitioner's "only other option * * * is to await dismissal of the case and determine whether to pursue the appeal." *Id.* at 44a. The panel further explained that, "[i]f a debtor cannot obtain a stay of the dismissal pending appeal, this option could potentially result in the loss of the property. Such an outcome would not only irreparably harm [petitioner] but would significantly alter his incentive to pursue an appeal." *Ibid.*

The bankruptcy appellate panel subsequently affirmed the bankruptcy court's order denying confirmation of petitioner's proposed plan. Pet. App. 18a-36a. The panel agreed with the bankruptcy court that the "hybrid plan" was "inconsistent with the governing sections of the Bankruptcy Code." *Id.* at 20a; see *id.* at 23a-36a; 11 U.S.C. 1322(b)(2) and (5), 1325(a)(5)(B)(i)(I), 1328(a)(1).

5. Petitioner filed a notice of appeal to the First Circuit. Pet. App. 3a. Petitioner also asked the bankruptcy appellate panel to certify the case for interlocutory appeal to the court of appeals under Section 158(d)(2). *Ibid.* The appellate panel denied the request, stating that certification was "unnecessary." *Id.* at 17a.

The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Pet. App. 1a-15a. The court stated that, because "bankruptcy cases typically involve numerous controversies bearing only a slight relationship to each other, 'finality' is given a flexible interpretation in bankruptcy." *Id.* at 5a (citation omitted). The court thus recognized that "an order may be final even if it does not resolve all issues in the [bankruptcy] case." *Ibid.* The court of appeals stated, however, that a bankruptcy-court order is appealable as of right only if it "finally dispose[s] of all the issues pertaining to a discrete dispute within the larger proceeding." *Ibid.* (citation omitted).

Applying those principles, the court of appeals held that "[a]n order of an intermediate appellate tribunal affirming the bankruptcy court's denial of confirmation of a reorganization plan is not a final order so long as the debtor remains free to propose an amended plan." Pet. App. 7a. Because the bankruptcy

court's order in this case allowed petitioner to file an amended plan within 30 days, and any such further proceedings would not be "ministerial," the court held that the order did "not finally dispose of all the issues pertaining to a discrete dispute within the larger proceeding." *Id.* at 7a-8a (citations omitted).

The court of appeals recognized that its decision would leave petitioner with the "unappealing" options of either proposing a plan he did not want, objecting to it, and appealing the order confirming that plan; or else allowing his bankruptcy case to be dismissed and appealing the dismissal order. Pet. App. 9a. The court observed, however, that instead of appealing in the first instance to the bankruptcy appellate panel, petitioner "could have sought certification and authorization to directly appeal" to the court of appeals. *Ibid.* (citing 28 U.S.C. 158(d)(2)). The court also noted that, if petitioner had "chosen to take his intermediate appeal to the district court rather than the [appellate panel], he could have sought permission to appeal the district court's interlocutory order under 28 U.S.C. § 1292(b)." *Ibid.* The court of appeals recognized that "neither of these routes provides for appeals as of right," but it asserted that the statutory mechanisms for discretionary interlocutory appeals "do provide a safety valve for situations in which delaying review by the court of appeals would be unjust or inappropriate." *Ibid.* The court concluded that its rule treating denials of plan confirmation as non-final "promotes judicial efficiency and is faithful to the limitations that Congress has placed on [the court's] jurisdiction." *Id.* at 13a-14a.

SUMMARY OF ARGUMENT

The bankruptcy court's order here was final and therefore appealable as of right under 28 U.S.C. 158(a)(1) because it conclusively sustained respondent's objection and conclusively denied confirmation of petitioner's proposed Chapter 13 plan. The bankruptcy appellate panel's order affirming the denial of plan confirmation was in turn equally final and appealable to the court of appeals under 28 U.S.C. 158(d)(1).

1. Section 158(a)(1) authorizes immediate appeals as of right "from final judgments, orders, and decrees * * * entered in cases and proceedings" in bankruptcy courts. 28 U.S.C. 158(a)(1). The phrase "cases and proceedings" is important, because a single bankruptcy "case" may consist of multiple distinct "proceedings." Appeals in ordinary federal civil litigation are governed by the "single judicial unit" rule. Under that rule, subject to limited exceptions, a "final decision" within the meaning of 28 U.S.C. 1291 must be one that terminates the entire case. That rule, however, does not apply in bankruptcy. Rather, it is undisputed that Section 158(a)(1) authorizes an appeal from any order that terminates a discrete proceeding within a bankruptcy case, even if the order does not terminate the case as a whole.

Congress has not defined the term "proceedings" in Section 158(a). An adjoining Bankruptcy Code provision, however, contains a non-exhaustive list of 16 kinds of "core proceedings." See 28 U.S.C. 157(b)(2). That list illustrates the range of discrete "proceedings" that may occur within a single bankruptcy case. One of the listed types of "core proceedings" is "confirmations of plans." 28 U.S.C. 157(b)(2)(L). The Federal Rules of Bankruptcy Procedure provide that,

when a dispute arises about whether a proposed plan should be confirmed, the validity of the plan is resolved as a discrete "contested matter" through relatively formal procedures. See Fed. R. Bankr. P. 3015(f), 9014.

The approach described above, under which orders that conclusively resolve discrete proceedings within the larger bankruptcy case are final and immediately appealable as of right, has an established historical pedigree and makes good practical sense. Such discrete controversies can often be reliably decided even while other issues remain outstanding, and no useful purpose would be served by deferring appeals until the termination of the entire bankruptcy case. And because orders resolving such disputes are often the building blocks for subsequent administration of the case, they may be difficult or impossible to unwind once the case is over.

2. It is well settled that, when a bankruptcy court grants confirmation of a proposed Chapter 13 plan, that order is final and immediately appealable even though it does not terminate the bankruptcy case as a whole. See *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 264 (2010). When a bankruptcy court terminates the same contested matter by conclusively denying confirmation of a proposed plan, its order is likewise final. A contrary rule would inappropriately favor creditors over debtors, by giving the former but not the latter a right to appeal adverse orders regarding plan confirmation.

3. The finality of the bankruptcy court's order denying confirmation of petitioner's Third Amended Plan is not altered by the fact that the court gave petitioner an opportunity to file a further amended plan

within a fixed period of time. Respondent's objection to the Third Amended Plan created a contested matter, which was subsequently adjudicated through relatively formal procedures, and the bankruptcy court conclusively determined that the plan was unconfirmable. If petitioner had proposed an alternative plan, any objection to that plan would have created a new contested matter, not a continuation of the prior dispute. For the same reason, the bankruptcy appellate panel's affirmance was likewise final, because the appellate panel conclusively determined that petitioner's Third Amended Plan could not be confirmed.

Practical considerations further support this result. Under the court of appeals' decision, a debtor could pursue an appeal as of right from the denial of plan confirmation only by (1) allowing his entire case to be dismissed and then appealing, or (2) successfully proposing a new plan and then appealing the order that confirmed the new plan. Both paths are wasteful and problematic. The first would put the automatic stay at risk, thus threatening debtors with foreclosure and other collection efforts. The second would be unavailable to some debtors and would pose litigation risks for most of the rest. It is unlikely that Congress intended for Section 158(a) to impose such barriers to debtors obtaining appellate review on such an important issue in Chapter 13 bankruptcy, particularly when creditors can freely appeal an order that terminates the same discrete proceeding but reaches the opposite result.

ARGUMENT

AN ORDER DENYING CONFIRMATION OF A PROPOSED CHAPTER 13 PLAN IS A FINAL ORDER THAT IS APPEALABLE AS OF RIGHT

A. A Bankruptcy-Court Order Is Final If It Conclusively Terminates A Discrete Proceeding Within A Bankruptcy Case

It is well settled, and apparently undisputed in this case, that bankruptcy-court orders are final and appealable as of right under Sections 158(a)(1) and (d)(1) if they "finally dispose of *discrete disputes*" within an ongoing bankruptcy case. *Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006) (quoting *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) (Breyer, J.)); Pet. App. 5a (same); Pet. Br. 16 (same); Resp. C.A. Br. 5 (same). That rule is supported by the statutory text, this Court's precedents, and the history and purposes of the bankruptcy laws.

1. Like other appellate-jurisdiction statutes, Sections 158(a)(1) and (d)(1) provide that a "final" order or decision is appealable as of right. Compare 28 U.S.C. 158(a)(1) and (d)(1), with 28 U.S.C. 1291, and 28 U.S.C. 1257. To be "final" for these purposes, an order must conclusively resolve the relevant matter and must "not requir[e] any further judicial action by the court * * * to determine the matter litigated." *Black's Law Dictionary* 705 (9th ed. 2009).

The meaning of the word "final" does not vary from one jurisdictional statute to another. See *In re Lindsey*, 726 F.3d 857, 859 (6th Cir. 2013) (seeing "no good reason to have 'final' mean one thing in [cases under Section 158] and another in [cases under Section 1291]" (citation omitted)). But the adjective "final"

does not identify the matter that an order must conclusively resolve in order to trigger a right of appeal. An order that does not terminate the entire case may nevertheless be conclusive (and therefore "final") with respect to specific claims, parties, or issues. The determination whether such orders are appealable as of right necessarily turns on aspects of the relevant jurisdictional scheme other than simply the word "final" standing alone.

In federal civil litigation, courts traditionally apply the "single judicial unit" rule, under which the entire case is the relevant unit in assessing finality and the only final decision is one that terminates an action. *In re Saco*, 711 F.2d at 443; see *Gelboim* v. *Bank of Am. Corp.*, No. 13-1174 (Jan. 21, 2015), slip op. 2; see also *ibid.* (a "final decision" within the meaning of 28 U.S.C. 1291 is ordinarily "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment" (quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945))). Even in ordinary federal civil litigation, however, there are several settled exceptions to that rule. Federal Rule of Civil Procedure 54(b) allows a court to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties." Fed. R. Civ. P. 54(b); see *Gelboim*, slip op. 3 ("Rule 54(b) relaxes" the single judicial unit rule); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 431-432 & n.3 (1956) (similar). The collateral-order doctrine allows appeal of a "small category" of orders that "do not end the litigation" but are nonetheless "final" because they are "conclusive," "resolve important questions separate from the merits," and "are effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Indus.*,

Inc. v. *Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995)). And some state-court orders are "final" under 28 U.S.C. 1257 even though "there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 479 (1975).

2. The "single judicial unit" rule does not apply in bankruptcy. "Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case*—and in particular, it has long provided that orders finally settling creditors' claims are separately appealable." *Howard Delivery*, 547 U.S. at 657 n.3 (quoting *In re Saco*, 711 F.2d at 444); see, *e.g.*, 1 *Collier on Bankruptcy* ¶ 5.08[1][b], at 5-40 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. Sept. 2014) (*Collier*) ("determinations of finality in the context of bankruptcy are dealt with in a more pragmatic and less technical sense than in other settings" (citation omitted)).

In 28 U.S.C. 158(a)(1) and (d)(1), Congress provided two textual indications that orders terminating discrete disputes within a larger bankruptcy case are appealable as of right. First, Congress granted district courts and bankruptcy appellate panels jurisdiction over appeals "from final judgments, orders, and decrees * * * entered in cases and proceedings" in bankruptcy courts. 28 U.S.C. 158(a)(1). Congress's use of the term "cases and proceedings" is significant. In the context of bankruptcy, the word "proceeding" is ordinarily understood to mean a "particular dispute or

matter arising within a pending case—as opposed to the case as a whole." *Black's Law Dictionary* 1324. Indeed, "a bankruptcy case is simply an aggregation of individual controversies, the resolution of which must be reached before bankruptcy distribution can be made." 1 *Collier* ¶ 5.08[1][b], at 5-41.

Second, Congress's reference to "final judgments, orders, and decrees" in 28 U.S.C. 158(a)(1) and "final decisions, judgments, orders, and decrees" in 28 U.S.C. 158(d)(1) further suggests that a broader array of judicial actions will be final and appealable in bankruptcy. In ordinary federal civil litigation, appeals are allowed from "final decisions" of the district courts. 28 U.S.C. 1291. The word "order" has broader sweep. See *Black's Law Dictionary* 1206 (defining "order" as a "command, direction, or instruction" and stating that it "generally embraces final decrees as well as interlocutory decisions or commands"); Pet. Br. 17-18.

Accordingly, a "particular dispute or matter arising within" a bankruptcy case may be a "proceeding" within the meaning of Section 158(a) even though it is a subset of the case as a whole. A bankruptcy-court order conclusively resolving such a "proceeding" is final and appealable as of right under Section 158(a)(1), even though other aspects of the case remain to be decided. And an order affirming a final order under Section 158(a)(1) is equally a final order within the meaning of Section 158(d)(1).

Congress has not defined the term "proceedings" in Section 158(a)(1). An adjoining Bankruptcy Code provision, however, see 28 U.S.C. 157, sheds light on that term's meaning. Section 157(a)(1) authorizes district courts to refer to the bankruptcy courts "all *proceedings* arising under title 11 or arising in or related

to *a case* under title 11." 28 U.S.C. 157(a)(1) (emphases added). Congress's use of the plural "proceedings" in conjunction with the singular "case" confirms that a single bankruptcy case may entail multiple "proceedings."

Section 157 further provides that "[c]ore proceedings include, but are not limited to," 16 distinct kinds of bankruptcy-related matters. 28 U.S.C. 157(b)(2); see *Executive Benefits Ins. Agency* v. *Arkinson*, 134 S. Ct. 2165, 2172 (2014) (certain matters that Congress classified as "core" must as a constitutional matter be treated as "non-core"). Although the distinction between "core" and "non-core" is immaterial here, that list illustrates the broad array of discrete "proceedings" that may be adjudicated within a single bankruptcy case. The list includes "allowance or disallowance of claims against the estate," "proceedings to determine, avoid, or recover preferences," "objections to discharges," and (particularly relevant here) "confirmations of plans." 28 U.S.C. 157(b)(2)(B), (F), (J) and (L). Section 157(b)(2) accordingly informs the identification of distinct "proceedings" within the meaning of Section 158(a)(1), and suggests that such proceedings include "confirmations of plans." 28 U.S.C. 157(b)(2)(L).

Pursuant to the Federal Rules of Bankruptcy Procedure, all disputes in bankruptcy are resolved either as "adversary proceedings" or as "contested matters." 1 *Collier* ¶ 1.01[2][b], at 1-6; *Gentry* v. *Siegel*, 668 F.3d 83, 88 (4th Cir. 2012) ("All disputes in bankruptcy are either adversary proceedings or contested matters." (quoting *In re American Reserve Corp.*, 840 F.2d 487, 488 (7th Cir. 1988))). An adversary proceeding is "akin to a full civil lawsuit" and is initiated by

the filing of a complaint. 1 *Collier* ¶ 1.01[2][b], at 1-6; see Fed. R. Bankr. P. 7001 (creating ten different kinds of "adversary proceedings"). Just as a party may appeal an order terminating a freestanding lawsuit, a party to an adversary proceeding may appeal a functionally identical order that terminates that proceeding, even if other aspects of the bankruptcy case remain to be adjudicated. See 1 *Collier* ¶ 5.08[1][b], at 5-41 ("Parties to these separate proceedings should not have to wait for the end of the entire bankruptcy proceeding before they can appeal." (quoting *In re James Wilson Assocs.*, 965 F.2d 160, 166 (7th Cir. 1992))); see also, *e.g.*, *Marshall* v. *Marshall*, 547 U.S. 293, 301-303 (2006) (exercising jurisdiction over appeal from final decision in an adversary proceeding).

Alternatively, a dispute may be resolved as a less-formal "contested matter." See Fed. R. Bankr. P. 9014; see also 1 *Collier* ¶ 5.08[1][b], at 5-43 ("[C]ourts should have a relatively easy time determining finality in bankruptcy so long as they recognize that each adversary proceeding or contested matter is a discrete unit and that, once that unit is defined, ordinary concepts of finality apply."). Such contested matters can be triggered by, *inter alia*, "objections to confirmation of a plan, relief from the automatic stay and the use of cash collateral, avoidance of a lien under [11 U.S.C. 522(f)], and the assumption or rejection of executory contracts or unexpired leases." Fed. R. Bankr. P. 9014 advisory committee's note (1983).

3. This Court and other appellate courts have long adjudicated appeals from orders that terminated discrete proceedings but not the entire bankruptcy case. *E.g.*, *Howard Delivery*, 547 U.S. at 657 n.3 (finding jurisdiction under Section 158(d)(1) over a bankrupt-

cy-court order denying priority to a claim); *Marshall*, 547 U.S. at 301-303 (appeal from final resolution of an adversary proceeding); *In re Riggsby*, 745 F.2d 1153, 1154 (7th Cir. 1984) ("[W]e think it reasonably clear that the dismissal by the bankruptcy judge of a complaint objecting to the discharge of the bankrupt is final."); *In re Saco*, 711 F.2d at 444 (collecting cases).

Allowing immediate appeals from orders that resolve discrete proceedings within a bankruptcy case promotes important interests. Unlike the usual civil case, "'bankruptcy cases typically involve numerous controversies bearing only a slight relationship to each other.'" Resp. C.A. Br. 5 (quoting *In re Northwood Props., LLC*, 509 F.3d 15, 21 (1st Cir. 2007)). Bankruptcy cases often continue for years, moreover, after such subsidiary disputes have been resolved. A Chapter 13 case, for example, typically continues for three to five years. See 11 U.S.C. 1322(d). And, again unlike in ordinary federal civil litigation, these discrete disputes will often involve parties who have no other interest in or connection to the larger bankruptcy case.

This does not mean that the discrete proceedings described above are *entirely* unconnected to the larger bankruptcy case. A particular contested matter may be severable from the case as a whole in the sense that the contested matter can be reliably decided even while other issues remain to be adjudicated; yet resolution of the contested matter may be an essential building block to orderly disposition of the issues that remain. For example, "[s]eparate and discrete orders in many bankruptcy proceedings determine the extent of the bankruptcy estate and influence creditors to expend or not to expend effort to re-

cover monies due them." *In re England*, 975 F.2d 1168, 1171 (5th Cir. 1992).

Perhaps paradoxically, that connection between many discrete proceedings and the overall bankruptcy case *reinforces* the conclusion that immediate appeal should be available as of right once the discrete proceeding has been conclusively resolved. While errors in ordinary federal civil litigation can typically be remedied by vacating a judgment and ordering a retrial, see *Mohawk Indus.*, 558 U.S. at 109, in bankruptcy such a do-over is often practically unavailable, since many individual actions in bankruptcy are difficult, if not impossible, to unwind at the end of the case. For example, an order approving the sale of estate property or determining that assets are not exempt from distribution, or an order appointing a trustee, cannot realistically be undone after assets have been sold or distributed to third parties or the trustee has finished administering the estate. See *In re England*, 975 F.2d at 1171; *In re Marvel Entm't Grp., Inc.*, 140 F.3d 463, 470-471 (3d Cir. 1998). Those practical considerations have long led courts to deem orders "final" in bankruptcy because they conclusively resolve a discrete dispute, even when superficially similar orders are not final in ordinary federal civil litigation. See *In re Saco*, 711 F.2d at 446-448.

B. An Order Conclusively Resolving All Objections To Confirmation Of A Chapter 13 Plan Finally Terminates A Discrete Proceeding, Regardless Of That Proceeding's Outcome

An order that conclusively resolves all objections to confirmation of a Chapter 13 plan terminates a discrete proceeding and is therefore final and appealable by right under Section 158(a)(1) and (d)(1). That is so

whether the order confirms or refuses to confirm the plan.

1. It is undisputed that an order confirming a Chapter 13 plan is a final order appealable as of right. See Resp. C.A. Br. 4-5. This Court has concluded that an order granting confirmation of a Chapter 13 plan is "final" for preclusion purposes. *Espinosa*, 559 U.S. at 269. The courts of appeals unanimously agree that an order granting confirmation of a plan is likewise final for purposes of appealability. *E.g.*, *In re Woolsey*, 696 F.3d 1266, 1268-1269 (10th Cir. 2012); see also Pet. Br. 24 n.6 (collecting cases).

Orders confirming plans are appealable even though confirmation of a plan is only one step toward the completion of the overall bankruptcy case. For example, a bankruptcy court does not address whether or to what extent to discharge debts until all plan payments have been made, which typically takes three to five years. See 11 U.S.C. 1322(d), 1328(a). In the interim, a debtor may seek to modify the plan, which could substantially alter plan terms and creditors' rights. See 11 U.S.C. 1329(a). And if a debtor fails to make required payments, a court may convert a Chapter 13 case to a Chapter 7 case—leading to liquidation of the debtor's assets—or dismiss the case outright. 11 U.S.C. 1307(c). There also may be "issues to be resolved through additional litigation, such as avoidance actions, claims allowance, * * * and interpretation and enforcement of the rights created under the plan." Rhett G. Campbell, *Issues in Litigation*, 1 J. Bankr. L. & Prac. 94, 94 (1991). An order confirming a plan is appealable as of right, however, because it terminates the discrete Rule 9014 contested matter that a credi-

tor initiates by objecting to the plan. See Fed. R. Bankr. P. 3015(f).

2. The appealability of an order terminating a Rule 9014 contested matter over the validity of a proposed plan does not depend on whether the court grants or denies plan confirmation. Whatever the outcome, such an order terminates the same discrete proceeding, namely the contested matter that a creditor initiated by objecting to the plan.

That result flows logically from the statutory text and the Federal Rules of Bankruptcy Procedure. Section 158(a)(1) authorizes appeals as of right "from final judgments, orders, and decrees * * * entered in cases and proceedings" in bankruptcy courts. 28 U.S.C. 158(a)(1). Section 157(b)(2)(L) identifies "confirmations of plans" as "core proceedings," suggesting that an order conclusively denying confirmation of a plan resolves a discrete "proceeding[]" within the meaning of Section 158(a). 28 U.S.C. 157(b)(2)(L). Bankruptcy Rule 3015(f) further provides that a contested matter regarding the validity of a plan is initiated when a creditor objects. See Fed. R. Bankr. P. 3015(f), 9014. That contested matter may be terminated either by an order sustaining objections to a proposed plan, or by an order overriding the objections and confirming the plan.

The process for resolving this discrete dispute is no less a "proceeding" when the bankruptcy judge denies confirmation of the plan than when she confirms it. The word "proceeding" ordinarily refers to a legal process, from start to finish, regardless of the substantive result produced. See *Black's Law Dictionary* 1324; *Webster's Third New International Dictionary* 1807 (1993) ("the course of procedure in a judicial ac-

tion or in a suit in litigation"). Precisely the same procedures apply in the contested matter here, regardless of the ultimate outcome. See Fed. R. Bankr. P. 3015(f), 9014.

By the same token, an order that sustains an objection and denies confirmation of a proposed plan is just as "final" a disposition of that contested matter as is an order confirming the plan. In either event, the order conclusively terminates the contested matter and does "not requir[e] any further judicial action by the court * * * to determine the matter litigated." *Black's Law Dictionary* 705. That is so even when, as here, the order permits the debtor to propose a substitute plan. If the debtor proposes a new plan, any objections to that plan would create a new and distinct contested matter. See Fed. R. Bankr. P. 3015(f); pp. 23-25, *infra*.

3. For the same reason, the bankruptcy appellate panel's decision was appealable as of right to the First Circuit under 28 U.S.C. 158(d)(1) because it affirmed the bankruptcy court's denial of plan confirmation. Section 158(d)(1) states that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section." *Ibid.* The bankruptcy appellate panel's affirmance was "entered under" Section 158(b). And it was "final" within the meaning of Section 158(d)(1), just as the bankruptcy court's order was "final" within the meaning of Section 158(a)(1), because it conclusively determined that petitioner's Third Amended Plan could not be confirmed. See Pet. App. 36a.

C. The Relevant "Proceeding" In This Case Is The Specific Contested Matter That Respondent Initiated To Challenge Petitioner's Third Amended Plan

Although the bankruptcy court conclusively rejected petitioner's proposed Third Amended Plan, the court gave petitioner 30 days to propose a further amended plan. See Pet. App. 2a. Thus, for purposes of the jurisdictional rule described above—*i.e.*, that a bankruptcy-court order that definitively resolves a discrete "proceeding" within the larger bankruptcy case is ordinarily appealable as of right—this case raises the further question of how the relevant "proceeding" should be defined. If the relevant "proceeding" is the specific contested matter in which respondent successfully opposed confirmation of the Third Amended Plan, the bankruptcy court's order was "final" as to that proceeding. But if the entire process by which a debtor seeks confirmation of *some* plan is viewed as a single "proceeding," the bankruptcy court's order was not "final" because it expressly contemplated the possibility of further efforts by petitioner to devise an acceptable plan. For a variety of reasons, the former conception of the relevant "proceeding" is more consistent with the text, structure, and purposes of the relevant Bankruptcy Code provisions.

1. Under the Federal Rules of Bankruptcy Procedure, each contested matter has a distinct formal starting point and a distinct formal ending point, and each contested matter is governed by established procedures. See Fed. R. Bankr. P. 3015(f), 9014. Indeed, although a contested matter concerning plan confirmation is initiated by an "objection," *ibid.*, that filing is more analogous to a complaint that initiates an ad-

versary proceeding than to an "objection" within an ongoing civil case. The objection to confirmation must be served "in the manner provided for service of a summons and complaint" under Bankruptcy Rule 7004, which governs commencement of adversary proceedings. See Fed. R. Bankr. P. 3015(f), 9014(b). Bankruptcy Rule 7004 is the analogue to Federal Rule of Civil Procedure 4, which governs service of a complaint to commence a new case. See Fed. R. Bankr. P. 7004; Fed. R. Civ. P. 4. Bankruptcy Rule 7005, which incorporates Federal Rule of Civil Procedure 5 and governs "pleadings and other papers" in an existing adversary proceeding, applies to papers filed "after" the objection to the proposed plan. Fed. R. Bankr. P. 7005, 9014(b). Many of the same rules that apply within the ten types of adversary proceedings also apply, with limited modifications, within the contested matter created when a creditor objects to a plan. See Fed. R. Bankr. P. 9014(c) and (d) (Bankruptcy Rules 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069 and 7071 apply in both adversary proceedings and contested matters.).

It is also significant that, when a bankruptcy court sustains objections to one proposed plan and the debtor then submits another, any contested matter concerning the second plan may involve fundamentally different issues and objections than did the first contested matter. Indeed, the creditor whose objection to the first plan was sustained may have no objection to the amended plan. For example, if a bankruptcy court sustained a bank's objection to a plan that sought to cram down a mortgage held by the bank, a debtor might propose a new plan that fully preserved that bank's rights while modifying the rights of another

creditor, such as a different bank that held a lien on the debtor's car. The second bank might object and initiate a new contested matter even though the first bank was content with the amended plan. The prospect that such sequential contested matters may involve distinct objections and different objecting parties reinforces the conclusion that each is a discrete "proceeding" within the meaning of Section 158(a).

2. Treating an order denying confirmation of a plan as interlocutory, when an order granting confirmation is final, would produce anomalous results. Under settled law (see pp. 20-21, *supra*), a creditor who has unsuccessfully opposed plan confirmation can immediately appeal as of right to the district court or bankruptcy appellate panel under Section 158(a)(1). If that first appeal is unsuccessful, the disappointed creditor can obtain a second level of review in the court of appeals. 28 U.S.C. 158(d)(1). Under the approach the court of appeals took below, by contrast, a disappointed debtor has no comparable right to immediate review of an order denying plan confirmation, but may instead pursue an interlocutory appeal only "with leave of the court." 28 U.S.C. 158(a)(3) and (d)(2).

To be sure, asymmetry "happens all the time" in civil appeals. *In re Lindsey*, 726 F.3d at 861. "A civil plaintiff for example may immediately challenge a grant of summary judgment to a defendant, but a defendant who loses his motion usually has to wait until after trial for appellate review." *Ibid.* But in ordinary civil litigation, any kind of entity may be a plaintiff or a defendant—indeed, the same party can play both roles in the same case at the same time. See Fed. R. Civ. P. 13 (governing counterclaims and crossclaims).

The rule that respondent advocates, by contrast, would systematically advantage creditors at the expense of debtors. In Chapter 13, only a debtor may propose a plan. 11 U.S.C. 1321. "[T]he debtor is always the party who seeks to confirm a plan; the creditor is always the party who seeks to deny confirmation." *Maiorino* v. *Branford Sav. Bank*, 691 F.2d 89, 95 (2d Cir. 1982) (Lumbard, J., dissenting). In Chapter 11, the debtor has an exclusive right to file a plan within the first 120 days of the bankruptcy. See 11 U.S.C. 1121. Treating denial of plan confirmation as non-final would thus create an asymmetry fundamentally different from that which regularly occurs in ordinary civil litigation.

3. In ordinary federal civil litigation, an order dismissing a suit without prejudice is final and appealable. *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949); see, *e.g.*, *Pal Family Trust* v. *Ticor Tit. Inc.*, 490 B.R. 480, 482-483 (S.D.N.Y. 2013) (same for adversary proceeding in bankruptcy). By contrast, an order granting a motion to dismiss one complaint but allowing the plaintiff leave to amend and thus file another "is not final." 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.1 & n.16, at 494-495 (3d ed. 1992 & Supp. 2014) (collecting cases). Within the context of the Bankruptcy Code's provisions for appellate review, the more salient of those two analogues is the established rule that a dismissal without prejudice is immediately appealable. That rule demonstrates that an otherwise-final order does not become unappealable simply because the order expressly contemplates the possibility that the plaintiff may undertake future efforts to obtain judicial relief.

To be sure, the bankruptcy court's order in this case resembles a dismissal with leave to amend in that it contemplates the possibility of further proceedings within the same ongoing case. If appellate jurisdiction in bankruptcy were governed by the usual rule that the case as a whole is the relevant "judicial unit" for purposes of assessing finality, that point of similarity would be dispositive. As explained above, however, a typical bankruptcy case includes numerous discrete "proceedings," with a concomitant right of immediate appeal when an individual proceeding is conclusively resolved. Within that framework, the crucial point is that the bankruptcy court's order conclusively resolved the contested matter concerning respondent's Third Amended Plan. Like an order in an ordinary civil suit dismissing without prejudice, which is appealable, the order denying plan confirmation terminated the "judicial unit" that in the bankruptcy context is the point of reference for assessing finality, even though that order contemplated the possibility of additional contested matters involving the same general subject (*i.e.*, plan confirmation).

4. When it denied confirmation of petitioner's Third Amended Plan, the bankruptcy court indicated that the case would be dismissed if petitioner did not propose a new plan within 30 days. See Pet. App. 2a. As the court of appeals observed (*id.* at 9a), petitioner could have appealed as of right under Section 158(a)(1) if he had allowed the bankruptcy court to dismiss the case, since the dismissal order would indisputably have been "final." The court of appeals also suggested that petitioner could have "propos[ed] an unwanted plan, object[ed] to it, and appeal[ed] its confirmation" if the plan was confirmed. *Ibid.* A rule

that would make one of those steps a prerequisite to an appeal as of right would create serious practical difficulties and would be inconsistent with the overall structure of the Bankruptcy Code.

a. Upon dismissal, the automatic stay that restrains creditors from taking action to collect debts or enforce liens against the debtor or the property of the estate terminates. See 11 U.S.C. 362(c). Many Chapter 13 cases are filed by homeowners and others who are deeply in debt and face foreclosure, repossession of their assets, or other collection efforts. Dismissal of the case—and loss of the automatic stay—"would not only irreparably harm [debtors] but would significantly alter [their] incentive to pursue an appeal." Pet. App. 44a.

A debtor could seek an extension of the automatic stay pending appeal. See Fed. R. Bankr. P. 8007(a)(1)(A) (formerly Fed. R. Bankr. P. 8005). Such relief, however, would require a preliminary injunction—"an extraordinary remedy never awarded as of right," *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)—and the debtor would have to persuade the bankruptcy court that its own ruling would likely be reversed on appeal. See *id.* at 20 ("A plaintiff seeking a preliminary injunction must establish," *inter alia*, "that he is likely to succeed on the merits."); 10 *Collier* ¶ 8005.06, at 8005-5 to 8005-6; *e.g.*, *In re A&F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014) (noting that "[t]he standard for granting a stay pending appeal mirrors that for granting a preliminary injunction"). That demanding standard is appropriate in ordinary federal civil litigation, where the filing of suit does not by itself constrain the defendant's ongoing conduct, and the burden is on the plain-

tiff to demonstrate that even temporary restrictions are warranted. The automatic stay in bankruptcy, however, reflects Congress's determination that, unless the statutory prerequisites to lifting the stay have been satisfied, a stay of collection efforts should follow from the commencement of the case alone. See 11 U.S.C. 362(a). Requiring debtors to forfeit the automatic stay in order to obtain appellate review as of right of an adverse plan-confirmation decision would thus subvert the balance that Congress has struck, particularly since creditors face no similar impediment to meaningful review of an order conclusively confirming a plan.[2]

b. The other alternative identified in the court of appeals' opinion—*i.e.*, that petitioner might have proposed an amended plan, objected to his own proposal, and appealed from any order confirming the plan, see Pet. App. 9a—is subject to significant practical and conceptual objections. Even when a particular debtor is able to obtain confirmation of a substitute plan, "the debtor would waste valuable time and scarce resources on a plan proposed only for the purpose of obtaining appellate review of the earlier order." *Mort Ranta* v. *Gorman*, 721 F.3d 241, 248 (4th Cir. 2013) (internal quotation marks and citation omitted). Such

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[2] Loss of the automatic stay is not the only adverse consequence for a debtor who submits to dismissal of his case in order to obtain appellate review of an order denying plan confirmation. If such a dismissal is deemed voluntary and a request had previously been made for relief from the automatic stay, the dismissal could bar an individual debtor from filing another bankruptcy petition for six months. See 11 U.S.C. 109(g)(2). And even if a debtor can re-file, the automatic stay in the new bankruptcy would last only 30 days unless the court granted the debtor an extension. 11 U.S.C. 362(c)(3)(A).

an appeal would place the debtor in the anomalous position of contesting the validity of the very plan he had proposed. And it would require the district court or bankruptcy appellate panel, in an appeal from an order confirming the alternative plan, to focus not on the legality of that plan, but on the propriety of an antecedent bankruptcy-court order (*i.e.*, the order denying confirmation of the debtor's original plan) that is not directly before the appellate court. See Pet. Br. 38-39 (discussing difficulties of utilizing this approach to obtain appellate review).

Even within the class of cases in which debtors are ultimately able to obtain appellate review via confirmation of substitute plans, there is no evident reason to prefer this roundabout mechanism to the more straightforward approach of treating the initial confirmation denial as a final order appealable as of right. Some debtors, moreover, will be unable to propose an alternative plan that the bankruptcy court will confirm. See Pet. App. 44a ("[I]t appears that [petitioner] could not realize confirmation of a subsequent amended plan."). For such debtors, if an order finally denying confirmation of a particular plan is treated as interlocutory, the only path to appellate review as of right is to allow the case to be dismissed, thereby threatening the automatic stay. That approach is inconsistent with Congress's design for the reasons set forth above.

5. The availability of permissive interlocutory review under 28 U.S.C. 158(a)(3) and (d)(2) does not support treating orders denying plan confirmation as non-final. See Pet. App. 9a-10a. As discussed above (pp. 19-22, *supra*), the order at issue here finally terminated a discrete Rule 9014 contested matter over

confirmation of a specific plan, and thus is appropriately appealable as a final order. The pertinent interlocutory-review provisions require potential appellants to rely on the discretion of the appellate courts, whereas creditors aggrieved by plan confirmations can access two levels of appellate review as of right.

In practice, interlocutory review provides only a limited safety valve for persons who seek to challenge non-final orders. Section 158(a)(3) allows interlocutory appeal "with leave of the court," without specifying the standard for such an appeal. 28 U.S.C. 158(a)(3). Courts, including the bankruptcy appellate panel below, have "generally adopted" the same standard that applies to interlocutory appeals under 28 U.S.C. 1292(b). 10 *Collier* ¶ 8004.08 & n.2 (collecting cases); see Pet. App. 42a (applying the Section 1292(b) standard). Certification of an interlocutory appeal to the court of appeals under Section 158(d)(2) is also rare, as one of the lower courts must certify that the appeal satisfies the standard for interlocutory review, and the court of appeals must exercise its discretion to hear the appeal. 28 U.S.C. 158(d)(2)(A); see also *Weber* v. *United States Trustee*, 484 F.3d 154, 161 (2d Cir. 2007) (declining to accept certified appeal and suggesting that circuit courts should accept such cases only when there is uncertainty in the bankruptcy courts or the decision below is patently incorrect).

6. Treating the denial of plan confirmation as final should not materially "encourag[e] start-and-stop appeals" or "discourag[e] negotiation and mediation." *Mort Ranta*, 721 F.3d at 263 (Faber, J., dissenting). It is unlikely that significant numbers of financially distressed debtors whose plans are denied "will waste their resources on a gratuitous appeal simply because

the option to appeal is available, when an amended plan would provide all the relief needed." *Id.* at 249 (majority op.). *Inter alia*, while the appeal is pending, the debtor must continue to make his secured debt payments, or a court could grant the creditor relief from the automatic stay. See 11 U.S.C. 362(d); *e.g.*, *In re Lopez*, 446 B.R. 12, 20 (Bankr. D. Mass. 2011) (three post-petition payments in arrears provided cause for lifting stay); *In re Skipworth*, 69 B.R. 526, 527-528 (Bankr. E.D. Pa. 1987) (failure to make post-petition mortgage payments is cause for lifting stay).

Bankruptcy law also protects against the risk that a debtor might propose an unrealistic plan and then appeal the bankruptcy court's order denying confirmation simply to delay expiration of the automatic stay. The Bankruptcy Code provides for relief from the automatic stay in specified circumstances even while the case is ongoing. See 11 U.S.C. 362(d). Although the bankruptcy court's refusal to confirm a proposed plan would not by itself justify an order lifting the automatic stay, the debtor's submission of a clearly invalid plan would be grounds for such an order. While "a lift stay hearing should not be transformed into a confirmation hearing," the debtor must show that the "proposed or contemplated plan is not patently unconfirmable and has a realistic chance of being confirmed." *John Hancock Mut. Life Ins. Co.* v. *Route 37 Business Park Assocs.*, 987 F.2d 154, 157 (3d Cir. 1993) (Alito, J.) (citation omitted).

Finally, predictions of a rash of start-and-stop appeals are unsupported by actual experience. Courts have long held that Sections 158(a)(1) and (d)(1) allow appeals as of right from multiple orders in any given bankruptcy case, and in the 12-month period ending

March 31, 2014, more than one million bankruptcy cases were filed in United States courts.[3] But instead of a flood of bankruptcy appeals, there has only been a trickle. In that same period, there were 2072 appeals to district courts under Section 158,[4] 914 appeals to bankruptcy appellate panels,[5] and 794 bankruptcy appeals to the courts of appeals.[6] There is no reason to suppose that this Court's resolution of the question presented will meaningfully alter those numbers.

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[3] Admin. Office of U.S. Courts, Federal Judicial Caseload Statistics 2014, Tbl. F: *U.S. Bankruptcy Courts—Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2013 and 2014* (Mar. 2014), http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/F00Mar14.pdf.

[4] This constitutes about one percent of the district courts' caseload. Admin. Office of U.S. Courts, Federal Judicial Caseload Statistics 2014, Tbl. C-2: *U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2013 and 2014* (Mar. 2014), http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/C02Mar14.pdf.

[5] Admin. Office of U.S. Courts, Federal Judicial Caseload Statistics 2014, Tbl. B-10: *U.S. Bankruptcy Appellate Panels—Appeals Commenced, Terminated, and Pending, by Circuit, During the 12-Month Periods Ending March 31, 2013 and 2014* (Mar. 2014), http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/B10Mar14.pdf.

[6] This constitutes about one percent of the courts of appeals' caseload. Admin. Office of U.S. Courts, Federal Judicial Caseload Statistics 2014, Tbl. B-1: *U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending by Circuit and Nature of Proceeding, During the 12-Month Period Ending March 31, 2014* (Mar. 2014), http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/B01Mar14.pdf.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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